

JICARILLA APACHE INDIAN TRIBE

IBLA 76-511

Decided February 16, 1977

Appeal from decision of New Mexico State Office, Bureau of Land Management, rejecting appellant's right-of-way application NM-24042 for a communication site.

Affirmed as modified.

1. Communication Sites--Environmental Policy Act-- Environmental Quality: Generally--Federal Land Policy and Management Act of 1976: Rights-of-Way --National Environmental Policy Act of 1969: Generally

An application for a communication site under 43 U.S.C. § 961 (1970) should be denied where utilization of an existing right-of-way is practical under 43 U.S.C. § 1763 (19) and where the proposed site would have an adverse impact on the environment.

2. Communication Sites--Environmental Policy Act-- Environmental Quality: Generally--Federal Land Policy and Management Act of 1976: Rights-of-Way--National Environmental Policy Act of 1969: Generally--Words and Phrases

"Practical." Under 43 U.S.C. § 1763 (19), utilization of a nearby existing communications site is practical where the site is suitable and the expense of utilization would not be unreasonable as compared with environmental damage from a proliferation of sites.

APPEARANCES: B. Reid Haltom, Esq., Nordhaus, Moses and Dunn, Albuquerque, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

The Jicarilla Apache Indian Tribe has appealed from a January 28, 1976, decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting its application NM-24042 for a 50-year right-of-way grant for a radio repeater site on Archuleta Mesa in Rio Arriba County, New Mexico. The site is on national resource lands just outside the Jicarilla Apache Reservation. The reason given for the State Office rejection is that the granting of an easement would be "in conflict with environmental considerations and decisions found in the approved Durango-Chromo Management Framework Plan relating to communication site control."

The application is for a radio repeater station for use by the Tribal Police Department, which presently operates such a station from Radio Hill, a promontory located within the Reservation and having an elevation of 7,672 feet. Appellant wishes to relocate the existing station because line-of-sight clearance obstructions presently inhibit communication with police units throughout large areas of the Reservation. Appellant alleges that the location for which it has applied is desirable because it is on the rim of a mesa at an elevation of 8,660 feet, and will thus provide the adequate police communication which is now lacking. Substantial portions of the applied-for site and proposed access road have been cleared without authority.

Approximately three-tenths of a mile away from and at an altitude of some 330 feet above the proposed site is the highest point, at 8,994 feet, on the mesa rim. There, a communication complex already exists, 1/ including radio towers and buildings for appellant's Tribal local government radio network, 2/ which is a separate

1/ While the two sites are not far apart, they are separated by a precipitous slope, which prevents ready access from one area to the other.

2/ Appellant's statement of reasons notes that the police transmissions may be received by "any mobile unit located in a police vehicle. * * * The Tribal Police can also receive signals from the Tribal local government radios * * *." The Tribal local government facility transmits to "any or all of the mobile radios in Tribal vehicles. The Tribal government radios can also receive signals from the Tribal police department * * *." The statement of reasons also notes that the Tribal local government station, which has a relay station on Archuleta Mesa, is manned "off and on" from 8 a.m. to 5 p.m. only; for the Tribal Police to use that station, even when the local government channel is being operated, the police would have to place a call to the station to transmit the police message.

entity from the police system. The New Mexico State Police, the Bureau of Indian Affairs, a fire lookout station and others also use facilities at the complex. Appellant has submitted a report from a communications consultant stating that the police network transmitter now located on Radio Hill cannot be placed on the existing communication tower used for the Tribal local government network because of "interference between the two Tribal radio systems as was found by actual tests." The report also states that it "would have been ideal to locate the police equipment at the Tribe's existing radio building and tower if the interference condition did not exist." Such interference apparently would not occur at the site for which the Tribe has applied.

The State Office decision rejecting appellant's application notes:

This decision is without prejudice to file a new application on the existing Archuleta Mesa communication facility complex located approximately three-tenths mile away from the proposed site after joint discussions and field examination by all parties concerned.

The Tribe objects to this alternative, which would require the changing of frequencies of either the local government or the Tribal Police channel for the following reasons:

[T]he cost of changing crystals in all of the local government and Tribal radios would be more expensive in terms of costs and labor than relocation of the existing tower on Radio Hill to the proposed site on Archuleta Mesa. If change in frequencies was decided upon as an alternative to the proposed relocation of the Police radio tower, 33 crystals would have to be changed, at an approximate cost of \$ 100.00 each. Also, such a change would require FCC approval which would result in additional expense and delay. The relocation to Archuleta Mesa can be accomplished with Police Department employees and does not require skilled workers.

The BLM decision states that "the requested site is in conflict with environmental considerations and decisions found in the approved Durango-Chromo Management Framework Plan relating to communication site control." The record also contains an Environmental Analysis Report (EAR) dated August 15, 1975, signed by the District Manager, Montrose, Colorado, BLM, and a Land Report dated July 28, 1975, made by a Realty Specialist from the Montrose BLM office.

Appellant argues that the State Office decision is in error for reasons summarized as follows:

Location of the Tribal Police repeater station on Archuleta Mesa will improve the communications network in the area and provide better communications for the reservation.

Location of the Tribal Police repeater station on the same tower as the local government repeater station will result in cross-interference.

Approval of the right-of-way application will not have an adverse environmental impact and is within the spirit of the Durango-Chromo Management Framework Plan.

The public safety of this isolated area requires adequate communications facilities.

The decision rendered was not made with full knowledge of the officer making the decision.

[1] Under 43 U.S.C. § 961 (1970), broad discretion is granted to the Department in matters involving communication sites. E.g., Utah Power and Light Company, 4 IBLA 63 (1971). Congress, however, has mandated that the Department in exercising such discretion avoid proliferation of separate rights-of-way and consider the protection of environmental quality. Section 503 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2778, 43 U.S.C. § 1763; 3/ section 101 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq. (1970).

3/ Section 503 of FLPMA, 43 U.S.C. § 1763, provides in part:

"In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way in common shall be required to the extent practical * * *. In designating right-of-way corridors and in determining whether to require that rights-of-way be confined to them, the Secretary concerned shall take into consideration national and State land use policies, environmental quality, economic efficiency, national security, safety, and good engineering and technological practices * * *."

The implications of section 4331 of NEPA were discussed in Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1112-13 (D.C. Cir. 1971):

* * * Section 101 sets forth the Act's basic substantive policy: that the federal government "use all practicable means and measures" to protect environmental values. Congress did not establish environmental protection as an exclusive goal; rather it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations.

* * * * *

"Environmental amenities" will often be in conflict with "economic and technical considerations." To "consider" the former "along with" the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. * * *

The Department recognizes its special responsibility to the governments of Indian tribes; nevertheless this does not absolve the Department from compliance with FLPMA and NEPA. See Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), which involved a lease of Indian lands. Congress envisaged certain benefits as accruing to citizens generally from the two statutes; the Department has the responsibility to assure that such benefits accrue to all, including members of Indian Tribes.

Here, the need for improved radio transmission for police and emergency purposes is not disputed. However, since there is an existing available site--at which the Tribe already has a transmitter--the question involves the practicality of utilization of that site under section 1761, as compared with environmental considerations.

The Tribe argues that there would be no adverse environmental impact from the additional easement. The EAR, supra, lists the environmental values to be preserved in the additional area requested:

B. Living Components

* * * * *

Mule deer, elk, bear, coyotes, bobcats, skunks, porcupine, rabbits, and rodents are prevalent mammals. * * * The mesa and rims provide above average raptor habitat. Bald and golden eagles utilize the general area in addition to several hawk species. The Archuleta Mesa rim has been inventoried as providing habitat for the endangered peregrine falcon.[4/]

* * * * *

The southern end of the mesa and the proposed site show extremely heavy concentration and utilization by deer. * * * Four elk were seen during site examination and one herd of about 15 reportedly utilizes the area year-round. Residents in the vicinity of the mesa report increasing elk numbers and utilization.

* * * * *

The most prominent point of the rim, about 3/10-mile northeast of the site, supports Osborne fire lookout which is occupied seasonally. There is no other human occupancy of the mesa. The mesa receives an occasional visit by outdoor recreationists, grazing permittees, communication site R/W grantees, and BLM employees.

* * * * *

D. Aesthetics

The proposed site and access road are in an area of open space. * * *

4/ Appellant's brief states that:

"* * * Mr. Bud Curtis, of the Bureau of Land Management in Durango, told me that Archuleta Mesa had a peregrine falcon habitat that should be protected. Referring again to the Durango-Chromo Management Framework Plan, the falcon habitat identified therein is at Perins Peak, not Archuleta Mesa."

While the existence of peregrine falcon habitat on the rim of Archuleta Mesa would be a compelling factual consideration in this proceeding, the result in this decision would be reached regardless of the peregrine falcon issue.

The site affords outstanding scenic views and exhibits a quality of solitude and peacefulness. Majestic mountain ranges can be seen in all directions. Scenic vistas from 50 to 100 miles are common, with a definite sensory impact on sight.

As to the effect of granting the additional easement, the EAR states:

1. Unmitigated Impacts

Communications Installation - The intrusion to a relatively undisturbed portion of the mesa within an inventoried endangered specie habitat is undoubtedly the single most significant impact of the proposed action. The additional visual impact of a 75' tower and 10'x10' building into an area not now supporting buildings would be significant. The facility would be visible from Dulce and Lumberton and NM highway 17.

The facility would also intrude into an area utilized by heavy concentrations of deer. Littering could occur from construction and maintenance activities.

The facility would require service from a trespass powerline that may constitute a hazard to raptors or other large birds. Depending on its design and electronic components, the proposed tower could be a hazard to the large birds.

Access Road - Existing access from the national resource land boundary to within 240 feet of the site is via an unimproved dirt trail road (see attached photos). Continued and increased use during all seasons of the year will, over time, cause unnecessary erosion and poor travel conditions. This trail across NRL is not a designated county road and has no legal status.

* * * * *

Increased use of the road associated with construction, operation, and maintenance of the communication facility would increase disturbance of the elk herd and represent a source of additional stress to all wildlife in the area traversed.

Upgrading and/or maintaining the road could result in increased use by outdoor recreationists and may contribute to indiscriminate off-road vehicle use and littering.

As the EAR notes, the access road which runs to the site in dispute was bladed in on national resource lands without permission of the BLM or any other agency of the government, and thus is without legal status. A topographical map included with the EAR indicates that this road is approximately a mile long, beginning at a cut-off from the other road to the existing communication complex on the mesa and ending some 240 feet from the proposed site. Because of the topography between the two sites, an additional access road is necessary.

After considering possible steps to mitigate adverse impacts, the EAR continues:

3. Adverse Impacts That Cannot Be Avoided

There would be some adverse impact on the endangered peregrine falcon habitat even with the above mitigating measures. The exact extent of impact is not readily identifiable.

In addition, adverse visual impacts would occur even if mitigating measures are taken. The facility would be located in a very exposed and prominent place separate from existing similar facilities.

There would be some deer and elk habitat losses and specie disruption even with the planting of disturbed areas with browse species.

There would be a period of time in which a possible hazard to raptor electrocution could be present associated with the trespass powerline serving the site.

Some additional stress and disturbance to wildlife associated with increased road use would occur even with restrictions on access and seasonal closures.

Some soil erosion and degradation to air quality will occur even with construction or water bars and/or culverts.

The record is clear that the additional easement would involve an adverse impact upon the environment. The question then becomes whether or not on balance there are prevailing economic, technical, or social considerations which make the existing site impractical under section 1761.

Appellant states that a change in transmission frequency to permit location of both the local government channel and the police

channel on the existing site would cost about \$ 3,300 plus the expense of obtaining FCC approval. On the other hand, even if the Tribe should obtain the new easement and thus not have to change crystals there would be significant costs to the Tribe beyond those of moving the existing Radio Hill tower and facility. The EAR section on possible mitigating measures indicates the Tribe would be required by BLM to incur substantial expenses for such matters as tower and building modification, painting and camouflaging, powerline modification, and access road improvement and upkeep.

In applying the balancing process, we note that during the 50 years of the grant there would be significant interference with natural processes of wildlife in the area, there would be aesthetic implications, and damage resulting from vehicular access to an additional area of Archuleta Mesa. On balance, the increased costs stated to be attendant to the Tribe's locating its police relay station at the existing site do not outweigh the adverse environmental impacts.

Appellant has raised arguments in respect of the Durango-Chromo MFP, supra, which was cited by BLM as the basis for its decision. The EAR is a part of the record examined by appellant's counsel. The MFP does not contradict the findings given in the EAR, and since the EAR focuses specifically upon the communication site in issue, we view the EAR as the more important document and a sufficient basis for decision. Utilization of the existing site is found to be practical under section 1761.

Appellant has requested an oral argument. The matter has been exhaustively presented in appellant's statement of reasons. Because it is not believed that additional argument would be helpful and for reasons of economy, the request is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss

Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Martin Ritvo
Administrative Judge

